Thomas Jefferson to Edmund Randolph, August 18, 1799, Partly Illegible, from The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO EDMUND RANDOLPH J. MSS.

Monticello, Aug. 18, 99.

Dear Sir, —I received only two days ago your favor of the 12th, and as it was on the eve of the return of our post, it was not possible to make so prompt a despatch of the answer. Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The bank law, the treaty doctrine, the sedition act, alien act, the undertaking to change the state laws of evidence in the state courts by certain parts of the stamp act, &c., &c., have been solitary, unconsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U S, without the adoption of their legislature, and so infinitely beyond their power to adopt. If this assumption be yielded to, the state courts may be shut up, as there will then be nothing to hinder citizens of the same state suing each other in the federal courts in every case, as on a bond for instance, because the common law obliges payment of it, & the common law they say is their law. I am happy you have taken up the subject; & I have carefully perused & considered the notes you enclosed, and find but a single paragraph which I do not approve. It is that wherein (page 2.) you say, that laws being emanations from the legislative department, &, when once enacted, continuing in force from a presumption that their will so continues, that that presumption fails & the laws of course fall, on the destruction of that legislative

department. I do not think this is the true bottom on which laws & the administering them rest. The whole body of the nation is the sovereign legislative, judiciary and executive power for itself. The inconvenience of meeting to exercise these powers in person, and their inaptitude to exercise them, induce them to appoint special organs to declare their legislative will, to judge & execute it. It is the will of the nation which makes the law obligatory; it is their will which creates or annihilates the organ which is to declare & announce it. They may do it by a single person, as an Emperor of Russia, (constituting his declarations evidence of their will,)

or by a few persons, as the Aristocracy of Venice, or by a complication of councils, as in our former regal government, or our present republican one. The law being law because it is the will of the nation, is not changed by their changing the organ through which they chuse to announce their future will; no more than the acts I have done by one attorney lose their obligation by my changing or discontinuing that attorney. This doctrine has been, in a certain degree sanctioned by the federal executive. For it is precisely that on which the continuance of obligation from our treaty with France was established, and the doctrine was particularly developed in a letter to Gouverneur Morris, written with the approbation of President Washington and his cabinet. Mercer once prevailed on the Virginia Assembly to declare a different doctrine in some resolutions. These met universal disapprobation in this, as well as the other States, and if I mistake not, a subsequent Assembly did something to do away the authority of their former unguarded resolutions. In this case, as in all others, the true principle will be quite as effectual to establish the just deductions, for before the revolution, the nation of Virginia had, by the organs they then thought proper to constitute, established a system of laws, which they divided into three denominations of I, common law; 2, statute law; 3, Chancery: or if you please, into two only, of I, common law; 2, Chancery. When, by the declaration of Independence, they chose to abolish their former organs of declaring their will, the acts of will already formally & constitutionally declared, remained untouched. For the nation was not dissolved, was not annihilated; it's will, therefore, remained in full vigor; and on the establishing the new organs, first of

a convention, & afterwards a more complicated legislature, the old acts of national will continued in force, until the nation should, by its new organs, declare it's will changed. The common law, therefore, which was not in force when we landed here, nor till we had formed ourselves into a nation, and had manifested by the organs we constituted that the common law was to be our law, continued to be our law, because the nation continued in being, & because though it

changed the organs for the future declarations of its will, yet it did not change its former declarations that the common law was it's law. Apply these principles to the present case. Before the revolution there existed no such nation as the U S; they then first associated as a nation, but for special purposes only. They had all their laws to make, as Virginia had on her first establishment as a nation. But they did not, as Virginia had done, proceed to adopt a whole system of laws ready made to their hand. As their association as a nation was only for special purposes, to wit, for the management of their concerns with one another & with foreign nations, and the states composing the association chose to give it powers for those purposes & no others, they could not adopt any general system, because it would have embraced objects on which this association had no right to form or declare a will. It was not the organ for declaring a national will in these cases. In the cases confided to them, they were free to declare the will of the nation, the law; but till it was declared there could be no law. So that the common law did not become, *ipso facto,* law on the new association; it could only become so by a positive adoption, & so far only as they were authorized to adopt.

I think it will be of great importance, when you come to the proper part, to portray at full length the consequences of this new doctrine, that the common law is the law of the U S, & that their courts have, of course, jurisdiction co-extensive with that law, that is to say, general over all cases & persons. But, great heavens! Who could have conceived

in 1789 that within ten years we should have to combat such wind-mills. Adieu. Yours affectionately.